IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 296 of 1980

and

FIRST APPEAL No 297 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

REGIONAL DIRECTOR

Versus

ACCUMAX LTD.

Appearance:

1. First Appeal No. 296 of 1980

MR SR SHAH for appellants in both the matters.

MR SG AMIN for MR KS NANAVATI for respective Respondent in both the matters.

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 16/06/2000

COMMON ORAL JUDGEMENT

These two First Appeals involve common question of law based on identical facts and therefore, I propose to decide both these Appeals by this common judgment and order.

2. First Appeal No.296 of 1980 is directed against the judgment and order dated 26th November 1979 passed by the Employees Insurance Court, at Ahmedabad in Application (ESI) No.76 of 1974, declaring that the attendance bonus paid by the applicant to its workers under the scheme Annexure.A to Exh.1 is not covered under the definitions of the term 'wages' under Section 2(22) of the Employees' State Insurance Act, 1948 and the Employees' State Insurance Corporation was not entitled to recover from M/s.Accumax Ltd., Rajkot, the contributions with regard to the said amount paid by the applicant to its employees.

3. First Appeal No.297 of 1980 is directed against the order dated 24th September 1978 passed by the Employees' Insurance Court, at Ahmedabad in Application (ESI) No.63 of 1973 whereby a similar question under challenge as above in First Appeal No.296 of 1980 was decided in the case of M/S. Ujwal Foundary Pvt.Ltd.

4. M/s.Accumax Ltd. of Rajkot (concerned in First Appeal No.296/80) and M/s.Ujwal Foundry Pvt. Ltd., Rajkot (concerned in First Appeal No.297/80) preferred separate applications under Section 77 of the Employees' State Insurance Act, 1948 against the Employees' State Insurance Corporation. These applications were separately numbered as Application (ESI) No.76/94 and Application (ESI) No.63/73 in the Employees Insurance Court, at Ahmedabad, respectively. Through these applications, M/s. Accumax Ltd. and M/s.Ujwal Foundary Pvt. Ltd. sought declaration against the Employees' State Insurance Corporation that the attendance bonus paid by them to its workers by virtue of the scheme was not covered by the definition of the term 'wages' as defined in Section 2(22) of the Act and that they were not liable to pay the contribution to the ESI Corporation under the Act in respect of the said amount of attendance bonus. These applications were allowed by the Employees Insurance Court, at Ahmedabad and the judgment and orders passed by the Employees Insurance Court in these two Applications Nos. (ESI) 76/74 and (ESI) No.63/73, dated 26th November 1979 and 24th September 1978 respectively are under challenge in these two appeals at the instance of the Regional Director, Employees State Insurance Corporation, Gujarat.

5. There is no dispute that the attendance bonus scheme was a scheme which was announced by the respondent Companies of their own and this scheme is neither a statutory scheme nor any scheme under the settlement. It is also not in dispute that the attendance bonus was to be paid after an interval of three months. On the premises as aforesaid, the common question which arises for consideration before this Court for the purpose of these appeals is as to whether such an amount of attendance bonus paid under the scheme as aforesaid is covered by the definition of 'wages' as given in Section 2(22) of the Employees' State Insurance Act, 1948? Section 2(22) of the Act is reproduced as under for ready reference:

"2. Definitions.-- In this Act, unless there is anything repugnant in the subject or context,--

.....

.....

.....

(22) "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any paid at intervals not exceeding two months but does not include--

(a) any contribution paid by the employer to any person fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge."

6. Mr.Shah, learned Counsel for the appellant in these cases has submitted that the scheme as such may be voluntary, but the payment of bonus which is made under the scheme impliedly becomes a part of the contract of employment and such amount has to be paid, once the scheme offered by the employer was accepted by the employees and was acted upon and any amount which is paid

to the employees as part of this scheme as attendance bonus is a payment as a part of the terms of the contract of employment. He has submitted that even if it is not a part of the contract of employment, it becomes a part of the contract of the implied term of contract of employment when the scheme introduced was accepted by the employees and acted upon by them and therefore, it must be covered by the term 'wages' within the meaning of Section 2(22) of the Act. In support of his submission, learned Counsel for the appellant has cited a decision rendered by the Supreme Court in the case of Wellman (India) Pvt. Ltd. v. Employees State Insurance Corporation, reported in AIR 1994 SC 1037 wherein it was held that the attendance bonus payable under the settlement is a wage within the meaning of Section 2(22) of the Employees' State Insurance Act, 1948. He also cited a decision of the Supreme Court in the case of Indian Drugs and Pharmaceuticals Ltd. v. Employees' State Insurance Corporation and ors., reported in (1997) 9 SCC 71 wherein it was held that overtime wages even in absence of stipulation for payment thereof in the original contract of employment are covered by the term 'wages' within the meaning of Section 2(22) of the Act. The Supreme Court in this case has held that when an employee does overtime work, it amount to acceptance of the same. There emerges concluded implied contract between the employer and employee and there is no need to write on each occasion separately on the letter of appointment. It becomes an integral part of original or revised contract of employment from time to time. Therefore, both the remunerations received during the working hours and overtime constitute composite wages and thereby it is a wage within the meaning of Section 2(22) of the Act. However, I find that the amount which is paid as wages against overtime cannot be placed at par with any amount which is paid to the employees under a scheme voluntarily introduced by an employer. The principle as has been laid down in this decision of the Supreme Court on the question of contractual employment cannot be applied to the cases where the attendance bonus is paid under a scheme voluntarily introduced by the employer and such a scheme and the terms thereon cannot be treated as if it has become a part and parcel of an implied term of contract of employment. It cannot be said to be a case of revising the contract of employment. Even if an employee who does overtime work and he gets wages in lieu thereof, it is certainly a wage paid to him for the work done by him and the same cannot be denied by any employer because that is actually a payment for the work done by the employee beyond the working hours and the wages have to be paid to any employee for the work by

him whether during the regular working hours or overtime after the regular working hours and therefore, such payment for overtime work has to be considered as a part and parcel of the contract of employment express as well as implied. Such a position is not at all comparable with the cases where an employer announces a scheme of attendance bonus not as a part of any settlement or any statutory scheme, but out of his own volition as an incentive for attendance.

7. As against it, learned Counsel for the respondent Mr.Amin has cited the decision of the Supreme Court in the case of Regional Director, Employees State Insurance Corporation and anr. v. Bata Shoe Company (Pvt.) Ltd., reported in (1986) 1 LLJ 138. In this case, the Supreme Court has observed that the bonus paid by the respondent to its employees is in the nature of ex-gratia payment or, as has been described in one of the settlements, it is paid as a gesture of goodwill on the part of the respondent and nothing else. Such amount cannot be regarded as part of the contract of employment. The bonus paid or payable by the respondent to its employees under the successive settlements and agreements made between them cannot be regarded as remuneration paid or payable to the employees in fulfillment of the terms of the contract of employment. Mr.Amin has also cited the decision of the Supreme Court in the case of M/s.Whirlpool of India Ltd. v. Employees' State Insurance Corporation, reported in AIR 2000 SC 1190. In this case, the Supreme Court considered the question as to whether the payments towards production incentive made by the appellant to its workers under the "Production Incentive Scheme" falls within the scheme and and ambit of 'wages' as defined in Section 2(22) of the Act and also the effect of payments being made quarterly i.e. at intervals exceeding two months. While considering this question, in para 13 of the judgment, the Supreme Court considered the same argument as was raised by Mr.Shah that such payment would fall within the first part of the definition of 'wages' as there is an implied contract for payment of the said amount. The Production Incentive Scheme with which the Supreme Court was concerned in this case was also not a scheme as a part of any settlement. The payment as was made under the Production Incentive Scheme is certainly at par with the payment as was declared in the instant case under the attendance bonus scheme. While answering the question as referred to above as was formulated by the Supreme Court in para 4 of the judgment after considering the provisions of Section 2(22) of the Act, the Supreme Court has observed that all the remuneration paid or payable in cash to an employee,

if the term of the contract of employment, express or implied, were fulfilled would be 'wages'. Under this part, neither the actual payment nor when the payment is made is of any relevance. The later part of Section 2(22) relates to payment of additional remuneration. The additional remuneration, if any, paid at intervals not exceeding two months and not falling in Clauses (a) to (d) would also be wages within the meaning of the term as defined. Under this part of the definition, there has to be payment and not only payability and the payment has to be at intervals not exceeding two months. The Supreme Court has also considered Wellman's case (supra) on which reliance was placed by Mr.Shah and has observed that as per Wellman's case the attendance bonus payable to the employees under the terms of settlement became part of contract of employment and therefore it was held to be remuneration payable under the contract of employment and that fell under the first part of the definition. In Wellman's case, it was held that expression 'if any paid' after the words 'other additional remuneration' will be inconsistent if the remuneration is payable under the contract of employment since such payment is not dependent on the will of the employer but on the fulfillment of the terms of the contract. It is, therefore, clear that any amount which is not dependent on the will of the employer may be a part of the implied contract of employment, but an amount which becomes payable at the will of the employer cannot become the part of the implied contract of employment. In para 13 of the judgment in the case of M/s. Whirlpool of India Ltd. v. E.S.I.C. (Supra) the Supreme Court has categorically held in no uncertain terms that the payment under the scheme such as 'Production Incentive Scheme' cannot be held to be an amount as part of the condition of the service requiring compliance of Section 9A of the Industrial Disputes Act for effecting any change in the conditions of service and such payments do not fall within the first part of definition of 'wages'.

8. In view of the discussion as aforesaid on the basis of the principle as laid down by the Apex Court in M/s.Whirlpool India Ltd. (supra), it is clearly discernible that any amount which becomes payable on the basis of a scheme introduced by the employer out of his own volition cannot be treated as a part of any term of implied contract of employment and such payment does not fall within the meaning of the first part of the 'wages' under Section 2(22) of the Act. The distinction has to be made between the amount paid or payable as a part of the contract of employment and the amount paid or payable otherwise than as a part of contract of

employment. In the facts of the present case this court finds that the amount paid or payable as attendance bonus is not an amount paid or payable as a part of the contract of employment and the contract of employment cannot be said to be revised expressly or impliedly by the Scheme of attendance bonus declared by the employer without any settlement.

9. So far as the second part of the definition is concerned, the additional remuneration must be payable at interval not exceeding two months whereas in the facts of the present case, it is admitted that the same was payable after three months and therefore, there is no question of the same being covered under the later part of the definition of Section 'wages' under Section 2(22) of the Act.

10. The upshot of the discussion as aforesaid is that the impugned orders as have been passed by the Employees' Insurance Court, at Ahmedabad in these two matters, on 26th November 1979 in Application (ESI) No. 76/74 and 24th September 1978 in Application (ESI) No. 63/73 do not suffer from any error, illegality or infirmity and the interpretation of Section 2(22) of the Act as has been taken by the Employees' Insurance Court is found to be in order. I do not find any force in these two appeals and both these appeals are hereby dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

(M.R. Calla, J.)